



Issue Date: 14 June 2006

Case No. 2006-SOX-81

In the Matter of

**Dr. Mark A. Kukucka
Complainant**

v.

**Belfort Instrument Company
Respondent**

**RECOMMENDED DECISION AND
ORDER OF DISMISSAL**

This case arises under the whistleblower protection provision of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, codified at 18 U.S.C. § 1514A (West Supp. 2003)(herein “the Act”). The Act and its implementing regulations at 29 C.F.R. Part 1980 prohibit retaliation by publicly-traded companies against their employees who provide information to their employers, a federal agency, or Congress, alleging violation of any Federal law relating to fraud against shareholders. In this case, the Complainant alleges that the Respondent obtained a restraining order against him in reprisal for voicing concerns about improper and unethical business practices. By letter dated March 31, 2006, the Regional Administrator, OSHA, dismissed the Complainant’s complaint on the grounds that the Respondent is not subject to the Sarbanes-Oxley Act, and the Complainant is not an employee covered by the whistleblower provisions of the Sarbanes-Oxley Act. The Complainant appealed the findings by letter dated April 28, 2006.¹

On May 8, 2006, I issued an Order to Show Cause, directing the Complainant to show cause as to why his complaint should not be dismissed on the grounds that the Court does not

¹ On April 17, 2006, I dismissed the Complainant’s previous claim (2006 SOX 57), in which he alleged that his employment was terminated by the Respondent in retaliation for reporting that officials of the Respondent were accepting gratuities or other gifts from persons seeking FAA contracts and approvals, on the grounds that the Complainant’s complaint did not fall within the Act, as the Respondent is not a publicly traded company, and the Complainant was not an employee covered by the whistleblower protections of the Act, and thus this Court did not have jurisdiction over the Complainant’s complaint.

have jurisdiction under the Sarbanes-Oxley Act. I noted that the Regional Administrator for the Occupational Safety and Health Administration dismissed the Complainant's complaint, on the grounds that the Respondent is not a company within the meaning of Title 18, U.S.C. § 1514A, because it is not a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934, or that is required to file reports under Section 15(d) of the Securities Exchange Act of 1934. The Regional Administrator also concluded that the Complainant, who was employed by the Respondent as a National Sales Manager, is not an employee who is covered under Title 18 U.S.C. § 1514A.

The Complainant submitted a response, dated May 19, 2006. The Complainant argued that, although the "public/private nature" of the Respondent was "currently unknown,"² its financial activities made it "directly reliant" on a publicly traded bank, Sun Trust, to stay in business, and if the Respondent "cooked the books" badly enough, Sun Trust may need to step in and take over the Respondent's business in order to minimize the bank's losses. The Complainant alleged that the Respondent "intentionally, willfully and deliberately engaged in fraud" against SunTrust Bank and its investors, and his understanding was that "the Sarbanes Oxley Act of 2002 merely requires that a complainant have a reasonable belief that he is blowing the whistle on fraud and protecting investors." Thus, given this relationship, the Complainant argued that the Respondent was covered by the Sarbanes-Oxley Act.

The Complainant also argued that the Respondent accepts public money to develop products, and that it has violated the strong public policy of protecting whistleblowers. Finally, the Complainant argued that it was plausible that, given the Respondent's business dealings with other companies, there was "public debt," which made the Respondent subject to the provisions of the Sarbanes-Oxley Act.

The Respondent did not file a response to the Complainant's submission.

By its terms, the Sarbanes-Oxley Act applies only to a "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78(d)), or any officer, employee, contractor, subcontractor, or agent of such company." 18 U.S.C. § 1514A(a). The primary purpose of the Act is "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws. PL 107-204 (HR 3763). Thus, if a company is not publicly traded, the Act does not apply.

Accordingly, with respect to the question of whether this Court has jurisdiction over the Complainant's claim under the Sarbanes-Oxley Act, I find that there is no genuine issue of material fact. The Complainant's complaint does not fall within the Act, as the Respondent is not a publicly traded company, and the Complainant is not an employee covered by the whistleblower protections of the Act. Thus, this Court does not have jurisdiction over the Complainant's complaint, and pursuant to 29 C.F.R. § 18.41, the Respondent is entitled to judgment as a matter of law.

² In his previous complaint, the Complainant conceded that the Respondent is not a public traded company.

Accordingly, IT IS HEREBY ORDERED that the Complainant's complaint under the Sarbanes-Oxley Act is dismissed.

SO ORDERED.

A

LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).